

Department of the Navy, DoD

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number of ways. These include personally informing others of the trial counsel's obligations under § 776.46 of this part, conducting training of law enforcement personnel, and appropriately supervising the activities of personnel assisting the trial counsel.

(5) Paragraph (a)(6) of this section supplements § 776.45 of this part, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. A trial counsel can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements that a trial counsel may make that comply with § 776.45 of this part.

(6) The "ABA Standards for Criminal Justice: The Prosecution Function," (3d ed. 1993), has been used by appellate courts in analyzing issues concerning trial counsel conduct. To the extent consistent with these Rules, the ABA standards may be used to guide trial counsel in the prosecution of criminal cases. See *United States v. Howe*, 37 M.J. 1062 (NMCRS 1993); *United States v. Dancy*, 38 M.J. 1 (CMA 1993); *United States v. Hamilton*, 41 M.J. 22 (CMA 1994); *United States v. Meek*, 44 M.J. 1 (CMA 1996).

(d) [Reserved]

§ 776.48 Advocate in nonadjudicative proceedings.

(a) A covered attorney representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of §§ 776.42 (a) through (d), 776.43, and 776.44 of this part.

(b) [Reserved]

§ 776.49 Truthfulness in statements to others.

(a) In the course of representing a client a covered attorney shall not knowingly:

- (1) Make a false statement of material fact or law to a third person; or
- (2) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or

fraudulent act by a client, unless disclosure is prohibited by § 776.25 of this part.

(b) [Reserved]

§ 776.50 Communication with person represented by counsel.

(a) In representing a client, a covered attorney shall not communicate about the subject of the representation with a party the covered attorney knows to be represented by another attorney in the matter, unless the covered attorney has the consent of the other attorney or is authorized by law to do so.

(b) [Reserved]

§ 776.51 Dealing with an unrepresented person.

(a) When dealing on behalf of a client with a person who is not represented by counsel, a covered attorney shall not state or imply that the covered attorney is disinterested. When the covered attorney knows or reasonably should know that the unrepresented person misunderstands the covered attorney's role in the matter, the covered attorney shall make reasonable efforts to correct the misunderstanding.

(b) [Reserved]

§ 776.52 Respect for rights of third persons.

(a) In representing a client, a covered attorney shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) [Reserved]

§ 776.53 Responsibilities of the Judge Advocate General and supervisory attorneys.

(a) The JAG and supervisory attorneys shall make reasonable efforts to ensure that all covered attorneys conform to subpart B of this part.

(b) A covered attorney having direct supervisory authority over another covered attorney shall make reasonable efforts to ensure that the other attorney conforms to subpart B of this part.

(c) A supervisory attorney shall be responsible for another subordinate

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covered attorney's violation of subpart B of this part if:

(1) The supervisory attorney orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The supervisory attorney has direct supervisory authority over the other attorney and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) A supervisory attorney is responsible for ensuring that the subordinate covered attorney is properly trained and is competent to perform the duties to which the subordinate covered attorney is assigned.

(e) [Reserved]

§ 776.54 Responsibilities of a subordinate attorney.

(a) A covered attorney is bound by this part notwithstanding that the covered attorney acted at the direction of another person.

(b) In recognition of the judge advocate's unique dual role as a commissioned officer and attorney, subordinate judge advocates shall obey lawful directives and regulations of supervisory attorneys when not inconsistent with this part or the duty of a judge advocate to exercise independent professional judgment as to the best interest of an individual client.

(c) A subordinate covered attorney does not violate this part if that covered attorney acts in accordance with a supervisory attorney's written and reasonable resolution of an arguable question of professional duty.

(d) [Reserved]

§ 776.55 Responsibilities regarding non-attorney assistants.

(a) With respect to a non-attorney acting under the authority, supervision, or direction of a covered attorney:

(1) The senior supervisory attorney in an office shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of a covered attorney;

(2) A covered attorney having direct supervisory authority over the non-attorney shall make reasonable efforts to ensure that the person's conduct is

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compatible with the professional obligations of a covered attorney; and

(3) A covered attorney shall be responsible for conduct of such a person that would be a violation of this part if engaged in by a covered attorney if:

(i) The covered attorney orders or, with the knowledge of the specific conduct, explicitly or impliedly ratifies the conduct involved; or

(ii) The covered attorney has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(b) [Reserved]

§ 776.56 Professional independence of a covered USG attorney.

(a) Notwithstanding a judge advocate's status as a commissioned officer subject, generally, to the authority of superiors, a judge advocate detailed or assigned to represent an individual member or employee of the DoN is expected to exercise unfettered loyalty and professional independence during the representation consistent with subpart B of this part and remains ultimately responsible for acting in the best interest of the individual client.

(b) Notwithstanding a civilian USG attorney's status as a Federal employee subject, generally, to the authority of superiors, a civilian USG attorney detailed or assigned to represent an individual member or employee of the DoN is expected to exercise unfettered loyalty and professional independence during the representation consistent with this part and remains ultimately responsible for acting in the best interest of the individual client.

(c) The exercise of professional judgment in accordance with paragraph (a) or (b) of this section shall not, standing alone, be a basis for an adverse evaluation or other prejudicial action.

(1) Subpart B of this part recognizes that a judge advocate is a military officer required by law to obey the lawful orders of superior officers. It also recognizes the similar status of a civilian USG attorney. Nevertheless, the practice of law requires the exercise of judgment solely for the benefit of the